

*Reilly Tar re use to EPA Superfund  
dmsd letter*  
DORSEY, WINDHORST, HANNAFORD, WHITNEY & HALLADAY

2300 FIRST NATIONAL BANK BUILDING

MINNEAPOLIS, MINNESOTA 55402

68 W-FIRST NATIONAL BANK BUILDING  
ST. PAUL, MINNESOTA 55101  
(612) 227-8017

(612) 340-2600

CABLE: DOROW

TELEX: 29-0606

TELETYPE: (612) 340-2868

116 THIRD STREET SOUTHWEST  
ROCHESTER, MINNESOTA 55901  
(607) 288-3156

US EPA RECORDS CENTER REGION 5



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WILLIAM J. KEPPEL

(612) 340-2745

March 3, 1981

Thomas K. Berg, Esq.  
United States Attorney  
District of Minnesota  
234 United States Courthouse  
Minneapolis, Minnesota 55401

Re: United States v. Reilly Tar & Chemical Corporation  
Civ. No. 4-80-469

Dear Tom:

Our client, Reilly Tar & Chemical Corporation, has asked me to respond on its behalf to your letter of February 25, 1981 addressed to Edward J. Schwartzbauer. In that letter, you asked Reilly Tar to respond in writing within one week thereof. This letter constitutes that response.

In your letter, you state that the EPA has been authorized by the President, through Executive Order 12286 issued January 19, 1981, to exercise the authority to investigate given the President by Section 104(b) of the Comprehensive Environmental Response Compensation and Liability Act of 1980, P.L. 96-510. Purportedly acting pursuant to that authority, you state that the EPA intends to conduct certain investigations at the former Reilly Tar site in St. Louis Park, Minnesota. You also "offer" Reilly Tar the "opportunity to undertake those measures in place of EPA."

It is the position of our client that the investigations you have proposed are not yet permitted under either the Act or the Executive Order because there has not yet been promulgated a National Contingency Plan, as envisioned by the Act. Section 1-303 of the Executive Order is the section which delegates the President's authority under Section 104(b) of the Act. Section 1-303 expressly provides that all authority of the President to act under subsection (b) of Section 104 of the Act is to be exercised in accordance with

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the National Contingency Plan. Because no revised National Contingency Plan has yet been promulgated, the EPA has no authority under the Executive Order to act under Section 104(b) of the Act. Indeed, the Act itself provides, in Section 104(c)(4), that actions taken under any part of Section 104 of the Act are to be taken "to the extent practicable in accordance with the National Contingency Plan." This and other provisions of the Act demonstrate a clear intention that the National Contingency Plan be promulgated before actions which must be in accordance with it can be taken. In addition, Section 104(c)(3) of the Act states that actions pursuant to Section 104 are not to be taken unless certain conditions outlined in that Section have first been met. We are unaware that any of those conditions have yet been met, and you have not stated that they have.

Not only is the EPA not authorized at this time to act under Section 104(b), but, without promulgation of the National Contingency Plan, our client is unable adequately and fairly to assess its potential liability for the cost of actions taken by EPA. In your letter, you state that such costs may be imposed on our client pursuant to Section 107(a) of the Act. That section, however, provides for liability for costs of actions which are "not inconsistent with the National Contingency Plan." Unless and until such a Plan is promulgated, we are unable to ascertain whether any actions taken by the EPA are "not inconsistent" with that Plan. Accordingly, it is clear that we need not undertake any measures described in your "offer" at this time.

In addition to the above, our client does not believe that the measures outlined in your letter are either appropriate or necessary. There has been no showing that any problem which may exist at or near the former Reilly Tar site in St. Louis Park cannot be completely corrected by water treatment presently in place. There has been no showing of illness or disease attributable to the drinking water of St. Louis Park.

In fact, there has been no showing that polynuclear aromatic hydrocarbons have ever been found in the drinking water of St. Louis Park after treatment.

The radical and expensive steps which you have proposed are thus clearly inappropriate. Indeed, the very Act under which EPA claims authority to proceed is replete with requirements that action taken be cost-effective, balanced, and

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appropriate, given the instant situation. The measures which you suggest do not meet those requirements.

We continue to be desirous of participating in future discussions with you and your client in an effort to reach a fair and amicable resolution of this dispute.

With best regards,



William J. Keppel

WJK:sks

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## Abstract

- §1-303 of Executive Order 12280 delegates the President's authority under 5104(b) + says authority is exercised ~~under~~ in accordance w/ NC Plan

RECEIVED  
MAR 9 1981  
ENFORCEMENT DIVISION  
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